Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors*

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–34 OF 1997

DENIS ONG, MOHD NOOR AHMAD AND ABDUL AZIZ JJCA

6 AUGUST 2002

Civil Procedure *— Judge — Disqualification — Application to disqualify appellate judge from hearing appeal — Whether fear of bias held by applicants reasonable — Test to be applied in considering application*

The applicants applied to the court for the recusal of a certain member of the quorum of three judges in the Court of Appeal ('the second quorum') namely, Denis Ong JCA from hearing and determining the substantive appeal between the applicants and the respondents. The circumstances relied upon by the applicants for the recusal application was that Dennis Ong JCA was a member of another quorum of three judges in the Court of Appeal ('the first quorum') that had dismissed the applicants' appeal based on the preliminary objections raised by the first respondent.

Held, dismissing the application:

(1) The test to be applied is having regard to the circumstances mentioned, and the reasons for the decision stated in the judgment of the court, would it appear to the ordinary, reasonable and well-informed member of the public that there is a real possibility of bias by reason of prejudgment or prejudice on the part of Denis Ong JCA to hear the appeal proper in the sense that he might unfairly regard with disfavor the case of the applicants who were parties to the issues in the appeal which issues were to be considered by him in the second quorum (see p 84A–C).

(2) The issues decided by the first quorum and those to be determined by the second quorum were clearly different in nature and in subject matter. There was nothing in common between them. In short, they bear no relation to one another. Consequently, the decision on the preliminary objections was irrelevant to any future determination of the issues in the substantive appeal (see p 85C–D).

(3) Whether a decision is favorable or adverse depends upon by whom it is perceived, ie by the respondents or by the applicants. Where it is favorable to one party, there would be no application

* [*Ed Note: The judgment of Abdul Aziz JCA in this case was received by us earlier and reported in [2002] 4 MLJ 327. The judgments of Denis Ong and Mohd Noor Ahmad JJCA were only received recently and subsequent to our receipt of Abdul Aziz JCA's judgment. Hence this report. Any inconvenience caused is regretted.*]

for recusal for sure; but where it is adverse to the other party there might be, as in the case of the applicants here. A decision that is adverse to a party is not per se ordinarily a ground to disqualify a judge (see p 87B–C).

(4) There was no ground for the ordinary, reasonable and well-informed member of the public to suppose that Dennis Ong JCA might not bring an impartial and unprejudiced mind to bear on the issues in the substantive appeal. Neither was there any reason for the applicants to doubt that they would receive a fair hearing before Dennis Ong JCA in the second quorum (see p 88E).

[**Bahasa Malaysia summary**

Pemohon-pemohon telah membuat permohonan ke mahkamah untuk penarikan diri salah seorang ahli korum tiga hakim yang bersidang di Mahkamah Rayuan ('korum kedua') iaitu, Denis Ong HMR daripada mendengar dan menentukan rayuan yang substantif antara pemohon-pemohon dan responden-responden. Alasan-alasan pemohon-pemohon untuk permohonan penarikan diri tersebut adalah bahawa Denis Ong HMR merupakan seorang daripada ahli korum tiga hakim yang bersidang di Mahkamah Rayuan ('korum pertama') yang telah menolak rayuan pemohon-pemohon berdasarkan bantahan-bantahan awal yang dikemukakan oleh responden pertama.

Diputuskan, menolak permohonan tersebut:

(1) Ujian yang dipakai adalah dengan mengambilkira alasan-alasan yang dinyatakan, dan sebab-sebab untuk keputusan yang dinyatakan dalam penghakiman mahkamah, sekiranya dilihat oleh orang awam yang biasa, waras dan peka bahawa terdapat satu kemungkinan berat sebelah oleh sebab pra penghakiman atau prejudis di pihak Denis Ong HMR untuk mendengar rayuan sebenar di mana beliau mungkin akan berlaku tidak adil dengan tidak menyebelahi kes pemohon-pemohon yang merupakan pihak-pihak kepada persoalan-persoalan dalam rayuan di mana persoalan-persoalan tersebut akan dipertimbangkan oleh beliau dalam korum kedua (lihat ms 84A–C).

(2) Persoalan-persoalan yang telah diputuskan oleh korum pertama dan yang akan diputuskan dalam korum kedua adalah jelas berbeza dalam sifat dan perkara pokok. Tiada persamaan antara kedua-duanya. Pendek kata, kedua-duanya tiada kaitan antara satu sama lain. Oleh demikian, keputusan berdasarkan bantahan-bantahan awal tersebut adalah tidak relevan kepada mana-mana keputusan persoalan-persoalan dalam rayuan substantif masa hadapan (lihat ms 85C–D).

(3) Sama ada satu keputusan berpihak atau menentang bergantung kepada siapa yang melihatnya, iaitu oleh responden-responden

atau oleh pemohon-pemohon. Di mana ia berpihak kepada satu pihak, memang tidak akan ada satu permohonan penarikan diri; tetapi jika ia menentang pihak yang lain permohonan penarikan diri mungkin ada, sebagaimana dalam kes pemohon-pemohon di sini. Satu keputusan yang menentang satu pihak bukan per se satu alasan yang biasa untuk menarik keluar seorang hakim (lihat ms 87B–C).

(4) Tidak terdapat apa-apa alasan untuk orang awam yang biasa, waras dan peka mengandaikan bahawa Denis Ong HMR mungkin tidak akan berfikiran adil dan tidak prejudis apabila menimbangkan persoalan-persoalan dalam rayuan substantif ini. Begitu juga tidak ada apa-apa sebab untuk pemohon-pemohon meragui bahawa mereka akan menerima satu perbicaraan yang adil di hadapan Denis Ong HMR dalam korum kedua ini (lihat ms 88E).]

Notes

For cases on disqualification of judges, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3159–3160.

Cases referred to

Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application [2001] 2 MLJ 305 (refd)

Foss v Harbottle (1843) Hare 461 (refd)

JRL; ex parte CJL, Re (1986) 161 CLR 342; 66 ALR 239 (refd)

Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [2000] 1 All ER 65 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 32 (refd)

Reg v Gough [1993] AC 646 (refd)

Appeal from: Civil Suit No 22–109 of 1993 (High Court, Pulau Pinang)

Dato' VK Lingam (*R Thayalan* and *YS Leong* with him) (*Lye Poh Kham & Associates*) for the applicants.

Tan Lip Gay (*Leong Ng & Tan*) for the first respondent.

Dato' Ghazi Ishak (*Ghazi & Lim*) for the second respondent.

RJ Manecksha (*Ong & Manecksha*) for the third respondent.

Denis Ong JCA: By a notice of motion dated 7 May 2002 supported by an affidavit of Lim Tee Keng, the second appellant/applicant herein ('the said affidavit'), affirmed on the same date on behalf of all six appellants/applicants ('the applicants'), the applicants applied to the court for the recusal of a certain member of the quorum namely, Denis Ong JCA from

hearing and determining all further proceedings in Appeal No P02–34–97 between the applicants and the respondents named above.

The motion and the appeal proper were fixed by the registry for hearing in the appointed sitting of the Court of Appeal in Kuala Lumpur for the week commencing on 6 May 2002 and before a quorum of three judges, namely, Denis Ong, Mohd Noor Ahmad JJCA and Abdul Aziz J (as he then was) ('the second quorum'). The motion was in fact heard on 8 May 2002 and was disallowed with costs to the respondents to be taxed.

Hearing of the appeal proper was adjourned to a date to be fixed. At the time of pronouncing our unanimous decision, I also intimated that the grounds of our decision in writing would be given later. I do so now.

The events or circumstances relied upon for the recusal application are stated in grounds 14, 15, 18, 19 and repeated in paras 4(24), (25), (33), 5, 6 and 8 of the said affidavit.

They may be summarized thus:

(1) that on 9 November 1999 in another quorum of three judges of the Court of Appeal, ('the first quorum') I had, with Siti Norma Yaakob and Haidar JJCA, notwithstanding the applicants' submission that the hearing of the appeal should not proceed without the sanction of the official assignee:

  (a) refused on oral application by the applicants' counsel for an adjournment of the hearing of the appeal fixed for that day; and

  (b) dismissed the applicants' appeal based on the preliminary objections raised by the first respondent.

(2) that such dismissal was decided by the first quorum of which I was a member and that decision was a decision adverse to the applicants albeit on preliminary objections;

(3) that in the light of (1) and (2) above, although no actual bias was alleged by the applicants, an impartial, reasonable and fair minded bystander with knowledge of the relevant facts would perceive that there was a real danger of bias that a fair hearing of the applicants' appeal before the second quorum of which I am also a member would no longer be possible however much I may judiciously strive to avoid it;

(4) my recusal would ensure complete impartiality of the Court of Appeal without any real danger of bias and preserve the integrity and sanctity of the applicants' appeal.

The respondent did not file any affidavit. At the outset of their submissions, Mr Tan Lip Gay and Dato' Ghazi Ishak, learned counsel for the first and second respondents respectively indicated that they had no objection that I sit as a member of the second quorum to hear the appeal proper. The attention of the court was drawn by Dato' VK Lingam to a letter dated 5 July 2001 from the legal firm of M/s Ong & Manecksha addressed to the Deputy Registrar, Court of Appeal and copied to M/s Lye Poh Kam & Associates solicitors for the applicants, M/s Leong Ng & Tan solicitors for

the first respondent and M/s Ghazi & Lim solicitors for the second respondent, in which my name was listed together with three other judges as having previously dealt with the instant appeal. Mr RJ Manecksha learned counsel for the third respondent acknowledged that such letter issued from his firm but disclaimed authorship. He apologized for having named me in such letter when I did not hear the appeal. A B

What is the appropriate response upon a request made to the second quorum by the applicants for my recusal?

In *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65 at p 76, Lord Bingham CJ delivering the judgment of the English Court of Appeal referred to three categories of cases giving rise to recusal applications and how they should be dealt with by the judge concerned. He said: C

> [21] In any case giving rise to automatic disqualification on the authority of *Dimes v Proprietors of Grand Junction Canal* ((1852) 3 HL Cas 759, 10 ER 301) and *R v Bow Street Metropolitan Stipendary Magistrate, ex p Pinochet Ugarte (No 2)* ([1999] 1 All ER 577, [1999] 2 WLR 272, HL), the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve or the day of the hearing. Parties should not be confronted with a last minute choice between adjournment and waiver of an otherwise valid objection. If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. D E F

In the absence of any allegation of actual bias or personal embarrassment against me hearing the appeal, automatic disqualification was a non-issue. The allegation of the applicants was confined solely to one of apparent bias. G

The situation which confronted the second quorum seemed to come under the third category of Lord Bingham CJ and the question was that, having regard to events (1)(a) and (b) mentioned before, was this a right and proper case for me to stand down from the second quorum. That, following what Lord Bingham CJ said, was a matter for the second quorum (more particularly for me) to consider and exercise our judgment with reference to the particular objection of the applicants. H

The test of apparent bias applied in our courts was decisively settled by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 and consistently adhered to in *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305 and in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ I

321. That test was the real danger of bias test settled by the House of Lords in *Reg v Gough* [1993] AC 646 at p 670 which so far as is relevant is expressed in terms as follows:

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favor, or disfavor, the case of a party to the issue under consideration by him, ...'

Lord Goff of Chieveley made four points concerning that test namely,

(a) it applies to all cases of apparent bias;

(b) it calls for an ascertainment of the relevant circumstances of the case;

(c) the 'court' there personifies the reasonable man; and,

(d) the expression 'real danger' is preferred to 'real likelihood' to ensure that the court is thinking in terms of possibility rather than probability of bias.

According to Lord Bingham CJ in *Locabail,* the purpose of ascertaining the circumstances in point (b) is to see if there are any factors which may give rise to a real danger of bias. Everything depends on the facts which may include the nature of the issue to be decided and he gives instances in general terms by way of contrasts to illustrate his point. He expresses the view that ordinarily an objection could not soundly be based on a judge's previous judicial decisions but thinks otherwise in para 25 (at pp 77–78):

> ... or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such a person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind... or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.

However, he considers in para 25 (at p 78) that:

> The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.

On point (c) he states in para 17 (at p 74) that the approach to take is one that is:

> ... based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well-informed member of the public,...

so that the courts will ensure both that justice is done and that it is perceived by the public to be done. A

Applying the test in *Gough* to the present appeal and taking into account of the fact that the second quorum has yet to hear the appeal proper, the test might appropriately be formulated thus:

Having regard to the events or circumstances mentioned, and the reasons for the decision stated in the judgment of the court, would it appear to the ordinary, reasonable and well-informed member of the public that there is a real possibility of bias by reason of prejudgment or prejudice on the part of Denis Ong JCA to hear the appeal proper in the sense that he might unfairly regard with disfavor the case of the applicants who are parties to the issues in the appeal which issues are to be considered by him in the second quorum. B C

With reference to the test, Lord Bingham CJ observed in para 25 (at p 78):

> In most cases, we think, the answer one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favor of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater that passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. D

The first question to ask is what were the issues to be considered in the appeal proper. For the record, neither the first quorum nor the second quorum in fact heard the substantive appeal although fixed for hearing before them on 9 November 1999 and 8 May 2002 respectively. Proceeding on 9 November 1999 was terminated abruptly upon the first quorum upholding the preliminary objections of the first respondent and dismissing the appeal. Hearing of the substantive appeal on 8 May 2002 was adjourned to a date to be fixed after disallowance of the motion for recusal and upon application by the applicants. E F

From a perusal of the appeal record, it is clear that the subject matter of the appeal concerned an agreement in writing dated 1 September 1992 between the first respondent and the third respondent for the sale and purchase of 682,500 shares of MGR Corp Sdn Bhd. From the memorandum of appeal and the outline submission of the applicants, the applicants intended to raise three issues in the appeal for the decision of the second quorum. They were: G

(1) whether the agreement was null and void for various reasons;

(2) alternatively, whether the agreement was terminated by virtue of breaches of its terms; and, H

(3) whether the appellants had the locus standi to bring the action against the respondents in the first place under the rule in *Foss v Harbottle* (1843) Hare 461.

The main question for the decision of the first quorum on 9 November 1999 was whether this Appeal No P0234–97 was properly brought, based on two preliminary objections raised by Mr Tan Lip Gay, namely: I

(a) only the draft order was in the appeal record but not the sealed order; and,

(b) no chronology of events had been submitted to the registrar of the Court of Appeal.

The first quorum upheld both objections and decided as a matter of law that the appeal was not properly brought before it and consequently dismissed such appeal with costs. The judgment of the court was delivered by Haidar JCA (as he then was) and was reported in [2000] 1 MLJ 335. That was the judgment which the applicants identified as an 'adverse decision' against them albeit on preliminary objections — adverse in the sense that the outcome of such judgment was a dismissal of the substantive appeal (see para 4(25) of the said affidavit). Whether adverse decision is a ground of disqualification of a judge and the particular objection of the applicants are matters to be dealt with in a moment.

It will be observed that the issues decided by the first quorum on 9 November 1999 and those to be determined by the second quorum on 8 May 2002 are clearly different in nature and in subject matter. There is nothing in common between them. In short, they bear no relation to one another whatever. Consequently, the decision on the preliminary objections is irrelevant to any future determination of the issues in the substantive appeal.

I come now to the matter of whether an adverse decision is a ground of disqualification of a judge and the particular objection of the applicants. Lord Bingham CJ observed in *Locabail* in para 25 (at p 77) that ordinarily an objection for recusal is not soundly based on a judge's previous judicial decisions. He further observed in para 25 quoted above that the fact that a comment or finding is adverse to a party would not, without more, found a sustainable objection.

On the same point, Mason J in *Re JRL; ex parte CJL* (1986) 161 CLR 342; 66 ALR 239 observed with reference to the reasonable apprehension of bias test accepted in Australia, as follows:

> It seems that the acceptance by this court of the test of reasonable apprehension of bias in such cases as *Watson* (*R v Watson; ex parte Armstrong* (1976) 136 CLR 248) and *Livesey* (*Livesey v New South Wales Bar Association* (1983) 151 CLR 288; 47 ALR 45) has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. *It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.* There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that

> he will approach the issues in this way. *In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': Reg v Commonwealth and Arbitration Commission; ex parte Angliss Group* ((1969) 122 CLR 546 at 553-4); *Watson* ((1976) 136 CLR 248 at p 262); *Re Lusink; ex parte Shaw* ((1980) 55 ALJR 12 at 14; 32 ALR 47 at 50-1). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favor. (Emphasis added.)

Such observation of Mason J is equally relevant in the context of the real danger of bias test in Malaysia.

The particular ground of objection of the applicants is stated in paras 4(25) and 5 of the said affidavit which are reproduced below:

> 4(25)The learned judges of the Court of Appeal in allowing the preliminary objections raised by the first respondent, dismissed the applicants/ appellants' appeal herein with costs and the deposit is to account for the taxed costs. The decision of the Court of Appeal in dismissing the applicants/appellants' appeal herein based on the preliminary objections raised by the first respondent was an adverse decision made against the applicants/appellants.
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> A copy of the judgment of the Court of Appeal reported as *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [2000] 1 MLJ 335 is annexed herewith and marked as exh 'LTK – 14'.
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> 5 I have been advised by the applicants/appellants' solicitors and verily believe such advice to be true that on the principle that justice must not only be done but also be seen to be done, an impartial and reasonable and fair minded bystander with knowledge of the relevant facts, in the light of the adverse decision made on 9 November 1999 against the applicants/ appellants by the panel of the Court of Appeal comprising of her Ladyship Justice Dato' Siti Norma bte Yaakob, his Lordship Justice Dato' Haidar bin Mohd Noor and his Lordship Justice Datuk Denis Ong Jiew Fook, albeit on preliminary objections as stated in paras 4(24) and 4(25) above, there is a real danger of bias that a fair hearing of the applicants/ appellants' appeal herein before his Lordship Justice Datuk Denis Ong Jiew Fook will no longer be possible however much his Lordship Datuk Denis Ong Jiew Fook may judiciously strive to avoid it. For the avoidance of doubt, I unequivocally state that the applicants/ appellants are not alleging any actual bias on the part of his Lordship Justice Datuk Denis Ong Jiew Fook.

It should be plain and obvious to the informed objective bystander that in the face of such preliminary objections persisted by the respondents, a determination had to be made on 9 November 1999 by the first quorum on such objections. Either they were upheld or not. Such a decision was bound to be for one party and against the other. It could not be for or against both parties. If it were for the respondents as it turned out to be so, then it must result in a dismissal of the substantive appeal. To the respondents, such dismissal was a favorable decision but to the applicants, it was an adverse

decision. On the flip side, that was to say, if the first quorum were to decide those objections against the respondents, then it must result in a dismissal of their objections and also entail the actual hearing of the appeal on 9 November 1999 or at some future date to be fixed. To the respondents that would also be regarded as an adverse decision. But to the applicants it would be a favorable one.

From what has just been said it must be equally obvious that whether a decision is favorable or adverse depends upon by whom it is perceived ie, by the respondents or by the applicants. Where it is favorable to one party, there would be no application for recusal for sure; but where it is adverse to the other party there might be, as in the case of the applicants here. Surely, a decision that is adverse to a party is not per se ordinarily a ground to disqualify a judge as observed by Lord Bingham CJ and Mason J above. As stated in para 4(25) of the said affidavit, the basis for saying that the decision of the first quorum was adverse was the dismissal of the substantive appeal. But that dismissal was not without its grounds or reasons which were stated in the judgment of the court. They addressed the issues raised by those preliminary objections which as observed earlier in this judgment were dissimilar in nature and irrelevant to the issues in the substantive appeal. There is no way that those issues decided in the preliminary objections will ever again arise or be resurrected or become live or contentious issues at the hearing of the substantive appeal and consequently, no way could it be said by the informed objective bystander that the first quorum was infected by prejudgment or prejudice if it were to hear and determine the substantive appeal. The judgment of the court delivered by Haidar JCA was written in plain and not emotive language. There were no remarks or comments for or against any party. On any reading of that judgment, the bystander could only have concluded that it was sober, objective and impartial.

However, the allegation of bias according to the applicants was not based on the judgment of the court but on the fact of adverse decision of dismissal of the substantive appeal by the first quorum. More specifically, such allegation was targeted at me for my part in the decision-making process by virtue of the fact that I was part and parcel of the first quorum.

Paragraph 5 of the said affidavit which makes such allegation, speaks a mouthful in the first of two sentences. It is long, unwieldy, and somewhat unclear and incomplete, apparently because of the omission of certain words and the lack of particulars of the allegation. So far as I can make sense out of it, the complaint is general, the gist of which is that notwithstanding my best efforts, I will fail in my judicial duty to put such adverse decision of dismissal out of my mind so that it will be a foregone conclusion that ultimately the substantive appeal would also be dismissed. In short, the applicants seem to allege that the danger of bias in me is so real that I am as good as actually biased although in the second sentence they are quick to disclaim any such allegation.

My legal response to that allegation is to repeat what Mason J observed in *Re JRL; ex parte CJL* which was quoted above:

> There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': ....

In the case of the applicants, prejudgment has not been established by them.

On the factual aspect, let me say here and openly that to me this appeal is no different from any other although to the applicants it is of great importance. Equally to me, the parties to this appeal are treated no differently from any other litigant who have filed through my court over the years. In this regard, I repeat what I said in open court on 8 May 2002 that I do not profess to know any of the applicants or the respondents at all. I have no interest in the subject matter of the appeal nor have I any reason to be concerned with the outcome of the appeal. That was the position before and still is today. The fact that I sat in the first quorum and will sit again in the second quorum is not of my making, it is a matter entirely out of my hands.

In the premises, I conclude that the objection of applicants is without substance. There is no ground for the ordinary, reasonable and well-informed member of the public to suppose that I might not bring an impartial and unprejudiced mind to bear on the issues in the substantive appeal. Neither is there any reason for the applicants to doubt that they would receive a fair hearing before me in the second quorum. Thus, in my judgment this was not a right and proper case for me to abdicate my judicial function and to stand down from the second quorum upon the request of the applicants. As Edgar Joseph Jr FCJ stated in *Majlis Perbandaran Pulau Pinang* at p 70B, the reason for the preference of the real danger of bias test was to 'avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias'.

For all these reasons stated, I disallowed the motion with costs to the respondents to be taxed. It was further ordered that hearing of the appeal proper be adjourned to a date to be fixed.

Mohd Noor Ahmad JCA: I have had the advantage of reading in draft the judgment of my learned brothers, who have expansively considered the issues on this application. The application was based simply on the fact that Denis Ong JCA was involved in the decision-making process by a quorum which made the decision adverse to the applicants on a preliminary objection, wherein no argument on the merits of the substantive appeal was advanced. The applicants claimed that while not alleging any actual bias on the part of Denis Ong JCA but an impartial and reasonable and fair-minded bystander with knowledge of the relevant facts would think that there is a real danger of bias that a fair hearing before him will no longer be possible

however much he may judiciously strive to avoid it. Hence, they relied on the principle that justice must not only be done but must also be seen to be done. With due respect, to my mind, such notion is only fit for the consumption of the ignorant and unreasonable bystander. I am in complete agreement that, for the reasons my learned brothers have given, the application should be dismissed. It would therefore be mere supererogation for me to furnish a lengthy judgment of my own.

Application dismissed.

Reported by Peter Ling